

BEFORE THE HOUSE JUDICIARY COMMITTEE

SB 36

February 9, 2011

Testimony of the Tongue River Water Users' Association

Dear Mr. Chairman and Members of the Committee:

SB 36 came out of the Water Policy Interim Committee. It grants discretion to courts to award attorney fees in water rights cases, but only if a decision of the Department of Natural Resources and Conservation is appealed to the district court.

The bill that came out of the Interim Committee did not address an award of fees at the administrative level, although there was discussion about it. The Interim Committee decided to leave out the language disallowing attorney fees incurred during the administrative proceedings, opting instead to grant courts full discretion in awarding fees.

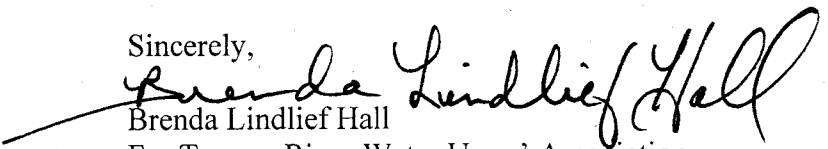
The bill was amended in the Senate Judiciary Committee to specifically disallow an award of attorney fees for work done at the administrative level. But that is where all the hard work is done. That is where the trial of the matter occurs. There is a pre-trial conference, and pre-hearing and post-hearing briefs must be filed, discovery conducted, hiring of experts, including hydrogeologists and other experts, working with witnesses, and going through the administrative hearing itself, which is a contested case under the Montana Administrative Procedure Act (MAPA). A district court in such cases is merely an appellate court and reviews the administrative record created during the administrative process.

If courts are granted discretion to award fees, it only makes sense that a court would be granted discretion as to whether or not to award attorney fees at all levels of the proceedings. There are 7 well-established factors that courts consider in deciding whether to award attorney fees or not. A list of the factors courts apply in deciding whether or not to award fees is attached.

This bill with the amendment disallowing fees during the administrative process will only deter Montanan's with senior water rights from making valid objections if their water rights are imperiled. It would also encourage frivolous claims and objections. If courts are given discretion to award attorney fees at all phases of the water rights proceedings—both the administrative and district court levels, it would send a signal to all parties to only bring claims that are meritorious. And it would level the playing field.

We urge an amendment deleting the language THE DISTRICT COURT MAY 18 NOT AWARD COSTS OR ATTORNEY FEES INCURRED AS A RESULT OF ADMINISTRATIVE PROCEEDINGS.

Sincerely,

  
Brenda Lindlief Hall

For Tongue River Water Users' Association

The seven factors used to determine the reasonableness of attorney's fees are:

- (1) the amount and character of the services rendered;
- (2) the labor, time and trouble involved;
- (3) the character and importance of the litigation in which the services are rendered;
- (4) the amount of money or the value of the property to be affected;
- (5) the professional skill and experience called for;
- (6) the attorneys' character and standing in their profession; and
- (7) the results secured by the services of the attorneys.

*Kruer v. Three Creeks Ranch of Woming*, 2008 MT 315, ¶ 45 (citing *Plath v. Shonrock*, 2003 MT 21, ¶ 36.) The above seven factors are not exclusive, and courts may consider other factors as well. *Plath*, 2003 MT 21 ¶ 36, 314 Mont. at 111, ¶ 36, 64 P.3d at \_\_\_, ¶ 36 (citing *Morning Star Enterprises v. R.H. Grover* (1991), 247 Mont. 105, 113, 805 P.2d 553, 558).

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